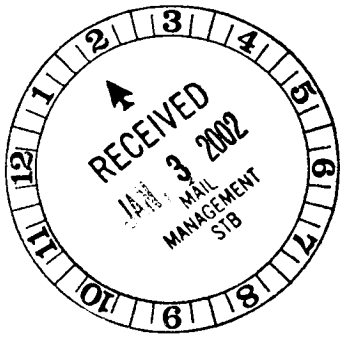
204273

Whiteside & Associates

Transportation & Marketing Consultants



January 2, 2002

Office of the Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001

Attn: Ex Parte No. 586 STB Reply Comments
Arbitration – Various Matter Relating to its Use as an Effective Means of Resolving Disputes that are Subject to the Board's Jurisdiction

Dear Mr. Secretary:

Pursuant to the Decision of the Board on December 12, 2001 in the above-described proceeding, please find enclosed the original and ten copies of the Reply Comments of the Wheat, Barley and Grains Commissions.

Also please find enclosed an IBM compatible floppy diskette electronic copy of the enclosed statement.

Please receipt duplicate copy and return in the self-addressed stamped envelope for our records.

Respectfully submitted,

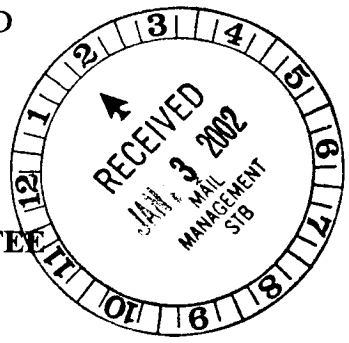
Terry C. Whiteside, Registered Practitioner
Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Kansas Wheat Commission, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission

ENTERED
Office of the Secretary
JAN 3 2002
Part of
Public Record

3203 Third Avenue North, Suite 301
Billings, Montana 59101
Phone: (406) 245-5132
FAX: (406) 252-3778
email: twhitesd@wtp.net

204273

BEFORE THE SURFACE TRANSPORTATION BOARD



REPLY COMMENTS
of
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
KANSAS WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION

STB Ex Parte No. 586
Arbitration – Various Matter Relating to its Use as an Effective Means of Resolving Disputes that are Subject to the Board's Jurisdiction

January 3, 2002

The above listed parties, referred to as the Wheat, Barley & Grains Commissions, herewith submit their reply comments as outlined in Notices in the above-styled proceeding issued by STB on September 18, 2001 and on December 12, 2001.

BACKGROUND

The Wheat, Barley & Grains Commissions are pleased to submit these reply comments as the Board explores Arbitration and hope the Board will look at these issues in light of the need for pro-competitive changes to national federal railroad policy. As the Wheat, Barley & Grain Commissions stated in their opening comments, and many of the twenty comments received by the STB in this proceeding confirm, if a rail customer is singly served, has no economically realistic modal alternatives, or is so small that the option of a formal rate relief proceeding is not realistic, there is little that customer can do to negotiate a fair rate and service contract if the railroad is not interested in providing one. It is for this reason that so many rail customers have been

urging the Board to set policies that would promote competition among railroads—to provide that balanced playing field that allows for private sector negotiated resolutions.

REPLY COMMENTS

True balanced negotiation rarely takes place in situations where the rail customer is captive or is at a size and resource disadvantage to the large and powerful market dominant railroads that exist today.

In their opening comments, PPL Generation, LLC stated, "The railroads, of course, are aware of the high costs of litigation, and have devoted extensive efforts to maintaining or increasing those high litigation costs. They reason (correctly) that high costs deter shippers from pursuing their statutory remedies, and reduce the benefits of any rate cases that are nevertheless filed. The result amounts to deregulation of many rates on captive traffic, contrary to the Act and the clear intent of Congress."[1] It is clear that one of the effects of high litigation costs has been to quash the ability of small captive rail customers to litigate and thus justify pursuit of rate or service complaints. The railroads counter this by implying that "the fact that existing procedures designed to address small disputes have not been employed by small shippers suggest that the purported problem that gave rise to the Board's proposal may be illusionary."[2] Of course, the fact remains that existing procedures don't work and don't begin to counter the massive dominant power the railroads are able to exert in negotiations over captive rail customers.

The AAR does admit that consensual arbitration "can promote private dispute resolution" but then curiously suggests that arbitration that could be called by the captive rail customer would not promote resolution. Experience in Canada suggests that the latter form of FOA arbitration does in fact result in settling disputes. "While it appears that the disputing parties have settled slightly more than half of the FOAs before the end of the arbitration process, the vast majority of those that completed the process were found in favor of the shippers."[3] The Canadian railroads

[1] PPL: Page 3 first full paragraph, Initial Comments
[2] AAR: Page 4-5, Initial Comments
[3] Canadian Railroads: Page 3 second paragraph, Initial Comments

state that only 23 FOA's have been invoked in the last 3 years, which seems to suggest that the threat of FOA's are in fact leading to resolutions of a great number of disputes. Could it be that FOA's are working in Canada and leading to private resolutions with not ALL of them favorable to the railroads? The Canadian Transport Authority seems to think so. It appears that more Canadian rail customer/railroad disputes are getting resolve BEFORE getting to FOA's because the process works. The key to understanding the AAR's and Canadian Railroad's non-favorable comments on FOA seems to be that the FOA process in Canada does work in resolution and does result in leveling the playing field allowing captive rail customers the possibility of obtaining a reasonable outcome. To the railroads, any procedure which allows shipper favorable outcomes, is considered unworkable. The initial comments by the railroads in this proceeding cast a bright light on what the market dominant railroad industry considers their franchise right in the litigation arena to outright victory.

The reasons for initiating an FOA process are clearly stated by the rail customers filing initial comments in this proceeding. PPL, Generation, LLC on page 4 of their initial comments: "There are many shippers – not just small volume shippers – for who, the rights the Act provides are difficult or impossible to invoke due to the excessive cost of litigating rate cases. Where no effective regulatory remedy exists, the potential value of the alternative remedy of arbitration is clear."[4] The American Chemistry Council states, "Some shippers need arbitration precisely because the Board's procedures are indeed "too costly or infeasible."[5] Dow Chemical states in its initial comments that it "supports the concept of Final Offer Arbitration and suggests procedures to ensure a streamlined, timely, and cost effective approach."[6] The Alliance for Rail Competition (ARC) suggests "the nature of the Board's existing arbitration process falls short of providing any realistic alternative dispute resolution. Since the Board has been granted the authority to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate, ARC suggests that a significant retooling of the Board's existing arbitration is necessary and appropriate to make it a usable tool."[7] "The FOA procedures are simple, cost effective, and expeditious. Moreover, because the arbitrator must decide only between the offers

[4] PPL: Page 4, first full paragraph, Initial Comments
[5] ACC: Page 2, paragraph 7, Initial Comments
[6] DOW: Page 7 second sentence in first paragraph, Initial Comments
[7] ARC: Page 2, Initial Comments

of the shipper and the carriers, both parties have a strong incentive to be reasonable in their approach."[8] The National Industrial Transportation League (NITL) on page 3 of their Initial Comments, "moreover, the use of arbitration to revolve a wide variety of disputes between shippers and rail carriers would be consistent with the growth in the use of arbitration to resolve commercial disputes in the nation as a whole." NITL continues on page 8, "the League strongly disagrees with the Board's assessment that a proper test would focus on the total amount of a shipper's traffic on single railroad. Such a test would render an arbitration remedy virtually useless, and would prevent the use of arbitration in instances where it would clearly be appropriate."

The railroads counter by suggesting a mediation process as an alternative dispute resolution process. Any mediation process without an FOA process given the overwhelming economic power possessed by the one party will not result in anything but more time consuming, more intimidation of the nation's rail customers. In a highly competitive market, negotiation, then mediation, followed by either regulatory or final offer arbitration (FOA) might make sense. In a market characterized with one entity having virtually total economic concentration and the rail customer virtually captive to the power possessed by the Class I railroads, is an environment where the effects of monopoly concentration do not allow for 'real' world application to the process. Mediation is simply another way for the railroads to intimidate a captive rail customer and further increase their expense. Mediation would do nothing to stimulate private resolution because if the railroad didn't like the result it would not be persuaded to resolve anything of substance. Mediation is a bad idea given the overwhelming economic power one side of the mediation has over the other side. One has to only think logically why the railroads would universally embrace mediation in this proceeding; it serves to deflect the powerful stimulus FOA would bring to level the playing field for the truly captive rail customers in really resolving disputes. Do the monopoly railroads really want to resolve disputes if they would result in solutions that would provide those parties they totally dominate with greater negotiating power? If they view FOA as granting greater negotiating power to captive rail customers, which apparently they do, they will suggest procedures that will thwart all efforts to provide more

---

[8] DOW: Page 8, last sentence, Initial Comments

economic fairness to the market place. Any monopoly would do the same. Monopolistic railroad behavior has resulted in both pricing and service abuses. The captive rail customers have been unable to receive freedom of competitive choice or adequate regulatory oversight to protect them from monopolistic abuse.

As the Wheat, Barley and Grains Commissions stated in its initial comments, the Board has extensive records on the rail customer community's desire for policy changes that would increase the ability of a rail customer to choose among rail carriers. However, in the absence of true freedom of choice of carriers, the Board should provide policies that would balance the economic power at the negotiation table.

Another issue discussed by many parties in their initial comments was the issue of applying arbitration standards to small versus large rail customers. ACC stated, "If arbitration is appropriate because the Board's "standard rate guidelines would be too costly or infeasible," there is absolutely no reason to restrict arbitration based on the size of the shipper or the traffic volume at issue. Further, devoting the Board's scarce resources to administering such limits would undermine the efficiency inherent in arbitration."[9] ARC in its opening statement, "disputes on rates and service can occur on small movements of big companies and big movements of small companies. The size of the shipper should not be a factor in determining who can require arbitration. The suggested unit of measure is any Origin to Destination pair for which a rate is requested."[10] The NITL on page 10 "believes that the proper approach to determine a "small rate case" that should be subject to arbitration is to focus on *origin-destination pairs*." The League then suggests "a movement over a specified origin to a destination pair should be eligible for arbitration if the movement would meet either a carload test or a freight revenue test over an annual period."[11]

[9] ACC: Page 2 6th Paragraph, Initial Comments
[10] ARC: Page 5, Initial Comments
[11] NITL: Page 10, 2nd paragraph, Initial Comments

Based upon the initial comments received by the STB in this proceeding, the Wheat, Barley and Grains Commissions believe that there should be a small case process and a large case process based upon the following criterion.

1. A **small case process** is instituted when the projected amount of charges over a year is less than $1,000,000 or a maximum of 2,000 carloads in any origin-destination pair.
2. A **large case process** for cases that do not fit under the definition of a small case.

NOTE: The size of the company nor the total number shipments made by a company should not be factor on the ability of rail customer to call for FOA arbitration.

Appropriate Types of Disputes for Arbitration:

1. Rates and charges, including demurrage;
2. Rail service disputes, including car supply and rail classifications;
3. Performance commitment;
4. Reasonableness of terminal switching and accessorial charges;
5. Loss and damage, including delay;
6. Competitive access; and
7. Unreasonable practices.

The Wheat, Barley and Grains Commissions believes the standards they put forth in their initial comments received substantial support from the rail customer community and reiterates its support for those standards. These included:

- In cases involving $1 million or less, such rules shall provide for the selection of a single arbitrator by the parties, or if the parties cannot agree, selection of a neutral arbitrator by the Secretary of Transportation from the roster established at the STB.
- In cases involving more than $1 million, unless the parties otherwise agree, such rules shall provide for the selection of a panel of three arbitrators, one chosen by each of the involved parties and a third chosen by the two arbitrators so named. If the two arbitrators cannot agree on a third arbitrator, the Secretary of Transportation shall choose the third arbitrator.
- The rules established by the Secretary shall provide for the compensation of the arbitrator(s) and procedures (including discovery at the discretion of the arbitrator or panel) for an expedited decision.
- In the case of disputes in which the reasonableness of a rate or charge is in issue, the arbitration shall be final offer arbitration, except that no rate shall be prescribed that does not equal or exceed 180% or revenue-variable cost as established in 10707 (d).

- In the case of disputes where the reasonableness of a specific rate or charge is alleged to have damaged the initiating party by no more than $500,000 a year for each year compensation is sought, the arbitrator shall consider rates for similar movements for similar commodities in circumstances where such rates or charges are subject to "effective competition" as defined under section 10707 (a).

- It should be established that an arbitration decision shall be issued no more than 120 days from the selection of the arbitrator in disputes involving $1 million or less, and no more than 180 days from the selection of the arbitrator(s) in disputes involving more than $1 million.

- It should direct that relief may be granted in the form of monetary damages as available under title 49, or specific performance of statutory obligations (including the prescription of reasonable rates) for a period not to exceed two years from the date of the arbitration decision, or both.

- Lastly it should be established that the resulting arbitration decision can only be upheld or vacated consistent with federal arbitration standards in Title 9, sections 9 and 10 of the United States Code.

The Wheat, Barley and Grains Commissions respectfully submits these reply comments and requests that The Surface Transportation Board support an arbitration process herein proposed within their policies and procedures. It further urges the STB to support the concept of FOA efforts with the members of Congress.

Your Wheat, Barley & Grains Commissions continue to believe that legislation will be required to provide pro-active balance to the mandates of the Board as it pertains to all matters of rail policy, including arbitration. They further believe that effective FOA arbitration that can be called only by the rail customer will provide an important usable tool in establishing reasonable rates and service for captive agricultural rail customers.

Submitted by:

01/03/02
Date:

Terry Whiteside,
Registered Practitioner
3203 Third Avenue North, Suite 301
Billings, Montana 59101
Phone: (406) 245-5132
Email: twhitesd@wtp.net

For:
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION
KANSAS WHEAT COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION